Filed 7/27/17 Nemer v. Superior Court CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

BUCHALTER NEMER et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; CENTRAL BASIN MUNICIPAL WATER DISTRICT ex rel. LETICIA VASQUEZ, Real Party in Interest.	B275709, B276714 (Los Angeles County Super. Ct. No. BC518653)

ORIGINAL PROCEEDING; petition for writ of mandate. Susan Bryant-Deason, Judge. Petition granted in part and remanded with instructions.

Bird, Marella, Boxer, Wolpert, Nessim, Drooks, Lincenberg & Rhow, Thomas R. Freeman, Paul S. Chan, Marc E. Masters

and Kate S. Shin for Petitioners Buchalter Nemer, a Professional Law Corporation and Douglas E. Wance.

Munger, Tolles & Olson, Bethany W. Kristovich and Laura K. Lin for Petitioners Sedgwick LLP and Curtis Parvin.

Law Offices of Jimmie Johnson and Jimmie Johnson for Real Party in Interest Central Basin Municipal Water District ex rel. Leticia Vasquez.

Petitioners Buchalter Nemer and Douglas E. Wance, joined by Sedgwick LLP (formerly Sedgwick, Detert, Moran & Arnold, LLP) and Curtis Parvin, seek review of a May 19, 2016 order of respondent court (Hon. Susan Bryant-Deason), overruling Buchalter and Wance's demurrer to the first amended complaint filed by real party in interest Central Basin Municipal Water District ex rel. Leticia Vasquez. A motion to dismiss filed by Sedgwick and Parvin was denied on the same grounds.

We conclude that Vasquez, in her capacity as a member of the governing board of the Central Basin Municipal Water District, should not have voted on a motion to have the district waive the attorney-client privilege with respect to this litigation. Accordingly, we grant the petition in part and remand to the superior court for further proceedings consistent with this opinion.

BACKGROUND

In August 2013, Leticia Vasquez filed this qui tam action in the name of the Central Basin Municipal Water District (Central Basin). As alleged in her complaint, Vasquez began serving as an elected member of the Governing Board of the Central Basin in January 2013, and shortly thereafter learned that $2,750,000 in

Central Basin funds had been transferred "secretly, improperly, illegally and without authority" to bank accounts controlled by two law firms, Sedgwick, Detert, Moran & Arnold, LLP (Sedgwick) and Buchalter Nemer (Buchalter). Vasquez alleged the transfer of funds provided no benefit to Central Basin, and one of her fellow board members referred to the transferred funds as "the 'Slush Fund.'"

According to the complaint, at the center of these illegal money transfers were petitioners Wance and Parvin, attorneys serving as General Counsel and principal legal advisors to Central Basin, who were alleged to be partners in or employed by Buchalter and Sedgwick. The first cause of action in the complaint concerns a money transfer from Central Basin to Sedgwick during Wance's and Parvin's association with Sedgwick. The second cause of action concerns two money transfers from Central Basin to Buchalter during Wance's association with Buchalter.

In the first cause of action, Vasquez asserted a claim for violations of the California False Claims Act (Gov. Code, § 12650 et seq.) against Sedgwick, Wance, and Parvin. As alleged in this cause of action, "Sometime prior to June 2010 the Central Basin Governing Board retained Sedgwick to provide legal services to the Central Basin. As part of that retention of services, Wance was designated by Sedgwick and the Central Basin as the principal attorney and primary contact person and General Counsel from Sedgwick for the Central Basin. Parvin, in conjunction with Wance was also designated by Sedgwick to provide legal services and advice to Central Basin."

According to the allegations in the first cause of action, Wance and Parvin created a false closed session agenda item for

the June 28, 2010 Central Basin public meeting, indicating the item was a conference with legal counsel regarding anticipated litigation. In actuality, Wance, Parvin and Central Basin's General Manager, Art Aguilar, are alleged to have used the false closed session agenda item to discuss ground water storage without disclosing the matter to the public on the agenda, because they knew there was public opposition to the Central Basin's use of resources for ground water storage. Wance, Parvin and Aguilar "used the false closed session entry as a legal pretext and ruse to secretly transfer $1 million from the Central Basin to a Sedgwick bank account without authorization from the Central Basin Governing Board" and "without disclosure of the $1 million transfer to the public as required by law." After the June 28, 2010 meeting, Wance, Parvin and Aguilar caused "false and erroneous minutes" to be prepared, stating "the Governing Board had instructed its General Manager to make resources available to Sedgwick for 'ongoing litigation.'" As alleged in the complaint, "The Governing Board members have denied that there was a vote to provide resources for ongoing litigation." On or about June 29, 2010, Wance and Parvin, with Sedgwick's knowledge and consent, caused $1 million of Central Basin's funds to be wired to a Sedgwick bank account. After a four-month "'cooling off'" or "'no snitching' period," Wance, Parvin, Sedgwick and Aguilar began "illegally" paying the money to their "associates, friends, political allies and other persons related to or otherwise associated with" them. The funds were not used for "ongoing litigation" or for "any lawful purpose properly authorized and disclosed by the Governing Board of the Central Basin."

In the second cause of action, Vasquez asserted a claim for violations of the California False Claims Act against Buchalter,

Wance and Aguilar. At some point, Wance left Sedgwick and joined Buchalter. As alleged in the second cause of action, "Sometime on or about February 2012 the Central Basin Governing Board retained Buchalter Nemer to provide legal services to the Central Basin. As part of that retention of services, Wance was designated by Buchalter Nemer and the Central Basin as the principal attorney and primary contact person and General Counsel from Buchalter Nemer for the Central Basin."

The second cause of action includes the allegations regarding the June 28, 2010 closed session agenda item and further alleges Wance "knowingly used the same false closed session entry as a pretext and ruse to obtain $1.75 million from Central Basin for Buchalter Nemer's and Wance's personal use and benefit without proper authorization from the Central Basin Governing Board and without disclosure to the public as required by law." According to the allegations in the second cause of action, Wance falsely claimed the Governing Board of Central Basin voted to approve the $1.75 million in transfers to Buchalter. On or about February 9, 2012, Wance, with Buchalter's knowledge and consent, caused $1 million of Central Basin's funds to be wired to a Buchalter bank account. On or about March 26, 2012, Wance, with Buchalter's knowledge and consent, caused $750,000 of Central Basin's funds to be wired to a Buchalter bank account. Starting in February 2012, Wance, Buchalter and Aguilar began "illegally" paying the money to their "associates, friends, political allies and other persons related to or otherwise associated with" them. The funds were not used for "ongoing litigation" or for "any lawful purpose properly

authorized by or disclosed to the Governing Board of the Central Basin."

In the complaint, Vasquez sought $1 million in damages from Sedgwick, Wance and Aguilar, and $1.75 million in damages from Buchalter, Wance and Aguilar. She also sought treble damages, civil penalties, and other relief under the California False Claims Act. She did not seek any relief against defendant Parvin in the complaint. Most relevant to this petition, Vasquez also seeks "[p]ercentage damages for Qui Tam Plaintiff Vasquez as provided by law (Government Code, § 12652(g)(2), (3) and (4))."

Central Basin declined to intervene in this action.

Buchalter, joined by Wance, demurred to the initial complaint. That demurrer was sustained with leave to amend to address the argument that due process prevented Vasquez from pursuing her claims, because the duty of the defendants, who were counsel to Central Basin, to protect their client's privilege would render them unable to mount a defense. In light of that ruling, Vasquez amended her complaint to allege facts that she asserted supporting a finding of implied waiver of the privilege. Vasquez alleges that she attempted to cause Central Basin to investigate the payments to Buchalter and Sedgwick and to recover the funds but that Central Basin's board and its general manager ignored her request to place an agenda item on for a board meeting, and refused to initiate litigation against Buchalter and Sedgwick. The first amended complaint alleges that Central Basin's board voluntarily and publicly acquiesced in the disclosure of specific legal advice it received from Wance, including through an investigative report by the law firm Arent Fox, which was retained to conduct an investigation. Arent Fox subsequently released a five-page letter to the Central Basin

board summarizing its investigation. Vasquez contends that Arent Fox revealed, at a March 24, 2014 public board meeting, the advice given by Wance.

Buchalter and Wance demurred to the first amended complaint on September 18, 2014, arguing that Vasquez did not adequately address the issues presented in the initial demurrer and did not establish an implicit waiver of the attorney-client privilege. Sedgwick and Parvin filed a motion to dismiss on the same day. Vasquez filed her opposition to the demurrer on September 29, 2014. On October 3, 2014, Buchalter and Wance filed a reply to Vasquez's opposition. The hearing was scheduled for October 14, 2014.

On October 10, 2014, Vasquez introduced a motion seeking to have the Central Basin board waive the attorney-client privilege. With a five-member board, the vote of three members of the Central Basin board was required in order to pass the motion. (Wat. Code, § 71274 ["no ordinance, motion or resolution shall be passed to become effective without the affirmative vote of a majority of the members of the board"].) In her return, Vasquez states that all five members of the board were present at the October 9, 2014 meeting, but that "[w]hen the agenda item regarding the waiver of the attorney-client privilege was called for discussion and vote, two board members, Messrs. Chacon and Hawkins, walked out and refused to participate, leaving three Board members present, Apodaca, Roybal, and Vasquez." All three remaining members voted to waive the privilege, and as a result of Water Code section 71274 requiring a majority of the members, Vasquez's vote was required for the motion's passage.

After an unrelated stay,[1] the demurrer to and motion to dismiss the first amended complaint was heard on May 19, 2016. The superior court took judicial notice of the vote, overruled the demurrer, and denied the motion to dismiss based on Central Basin's express waiver of the privilege. This petition followed.

Buchalter and Wance assert that the superior court should have sustained the demurrer, and Sedgwick argues that the court should have granted the motion to dismiss, based on their argument that Vasquez violated the conflict of interest provisions of the Political Reform Act of 1974 by participating in the vote and based on the superior court's prior finding of no implied waiver. They argue that writ review is necessary because the superior court has placed them in "an impossible position: They must *now* either disclose otherwise privileged communications (subject to potential liability if the board's composition later changes), or protect the client's privilege at the cost of foregoing access to and use of privileged evidence critical to their defense." They seek a writ of mandate compelling the superior court to vacate the order overruling the demurrer and denying the motion to dismiss, and to enter a new and different order sustaining the order and dismissing the complaint.

Oral argument with respect to the petitions took place on May 22, 2017. On June 27, 2017, counsel for respondent Vasquez filed what she alleges is a "Notice of New Authority" pursuant to

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[1] In May 2014, Buchalter and Wance filed a motion to compel arbitration and to stay the action. The motion was denied, and Buchalter and Wance filed a notice of appeal on October 15, 2014. This Court affirmed the denial on February 25, 2016. (*Central Basin Municipal Water District v. Buchalter Nemer* (Feb. 25, 2016, No. B259179) [2016 WL 740839].)

California Rules of Court, rule 8.254. The notice did not address new legal authority, but instead contained a certification from the Board Secretary of Central Basin that on June 26, 2017, at a regular board meeting, the board approved a motion to "ratify the action taken by the Board on October 9, 2014 (in which the attorney client privilege was waived concerning the advice from its attorney's Doug Wance, Curtis Parvin, Sedgwick, LLP, formerly known as Sedgwick, Detert, Moran and Arnold, LLP and Buchalter Nemer)." The certification states that Vasquez did not vote on the ratification motion, instead "excused herself from room and discussion." The "motion to ratify" was approved by five of eight listed directors.[2] Petitioners filed separate letter briefs opposing the late filing as failing to comply with California Rules of Court, rule 8.254. They further allege that Vasquez and her counsel "participated" in the board action taken on June 26, 2017, within the meaning of the Political Reform Act of 1974.

DISCUSSION

Entitlement to writ relief

We may grant extraordinary relief under circumstances in which an order of the trial court disrupts the confidential relationship between attorney and client. For example, "[t]he need for the availability of the prerogative writs in discovery cases where an order of the trial court granting discovery allegedly violates a privilege of the party against whom discovery is granted, is obvious. The person seeking to exercise the privilege must either succumb to the court's order and disclose the privileged information, or subject himself to a charge of

[2] No information was provided as to the change in the number of directors from five to eight.

contempt for his refusal to obey the court's order pending appeal." (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 741.) As with discovery orders, the superior court's order taking judicial notice of the purported express waiver of the attorney-client privilege places petitioners in a similar position.

Express waiver of attorney-client privilege

Vasquez correctly states that because this case is a qui tam action, brought to benefit Central Basin, it, not Vasquez, is the real party in interest. She acknowledges, however, that her suit is in a "dual capacity," representing Central Basin and herself. "A person may bring a civil action for a violation of this article for the person and either for the State of California in the name of the state, if any state funds are involved, or for a political subdivision in the name of the political subdivision, if political subdivision funds are exclusively involved. The person bringing the action shall be referred to as the qui tam plaintiff." (Gov. Code, § 12652, subd. (c)(1).) However, although bringing the action in a representative capacity, a qui tam plaintiff has an individual claim for a portion of any proceeds of the action. In the event that the named political subdivision elects not to intervene in the action, as Central Basin declined in this case, "the qui tam plaintiff shall . . . receive an amount that the court decides is reasonable for collecting the civil penalty and damages on behalf of the government. The amount shall be not less than 25 percent and not more than 50 percent of the proceeds of the action or settlement and shall be paid out of these proceeds." (Gov. Code, § 12652, subd. (g)(3).) A qui tam plaintiff prevailing in a False Claims Act case is also entitled to expenses, reasonable costs, and attorney's fees. (Gov. Code, § 12652, subd. (g)(8).)

Among other arguments, Vasquez contends that there exists a unity of interest between herself and Central Basin. This, however, does not negate her obligations to avoid conflicts of interest, and the appearance of conflicts of interest, under the Political Reform Act of 1974 (PRA) (Gov. Code, § 81000 et seq.).

The PRA was enacted by initiative in June 1974. (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 988.) The PRA also established the Fair Political Practices Commission (FPPC), which is authorized to adopt regulations to carry out the purposes and provisions of the PRA. (*Ibid.*; Gov. Code, §§ 83100, 83112.) Government Code section 87100 provides that "No public official at any level of state or local government shall make, participate in making or in any way attempt to use his official position to influence a governmental decision in which he knows or has reason to know he has a financial interest." A public official "has a financial interest in a decision within the meaning of Section 87100 if it is reasonably foreseeable that the decision will have a material financial effect, distinguishable from its effect on the public generally, on the official." (Gov. Code, § 87103.) "Taken together, a public official has a conflict of interest under section 87100 if (1) the official has a financial interest of the type delineated in section 87103, (2) 'the effect of the governmental decision on the official's financial interest [is] reasonably foreseeable . . . ,' (3) 'the foreseeable effect of the governmental decision on the [financial] interest [is] material, . . .' and (4) that effect is '"distinguishable from [its effect on] the public generally."'" (*Santa Clarita Organization for Planning and the Environment v. Abercrombie* (2015) 240 Cal.App.4th 300, 314.)

The regulations adopted by the FPPC drill down further on this standard, including stating that a "financial effect need not be likely to be considered reasonably foreseeable. In general, if the financial effect can be recognized as a realistic possibility and more than hypothetical or theoretical, it is reasonably foreseeable. If the financial result cannot be expected absent extraordinary circumstances not subject to the public official's control, it is not reasonably foreseeable." (Cal. Code Regs., tit. 2, § 18701, subd. (b).)

The order overruling the demurrer and denying the motion to dismiss, which relied upon the express waiver of the privilege, did not detail the court's reasoning behind its conclusion that Vasquez did not have a financial interest such that she was precluded from participating in the vote. At the hearing, however, the court adopted the "substantial likelihood" reasoning set forth in *Smith v. Superior Court* (1994) 31 Cal.App.4th 205 and concluded that "a public official has a financial interest if it is reasonably foreseeable, which means if there's a substantial likelihood that the decision will have a material, financial effect on the official. [¶] An effect is considered reasonably foreseeable if there is a substantial likelihood that it would occur." Applying this to Vasquez, the court took this even a step further, stating that in order to accept petitioners' argument, it would have to conclude that the defendants did violate the law and that they will be required to pay back the $2.75 million, because only in that case would Vasquez receive a percentage. The court held that "it's just a mere possibility that [Vasquez] may recover anything. Indeed, all Vasquez's vote did is to allow for privileged material to be deemed unprivileged and revealed so that the parties can proceed to discovery."

The central issue in this petition involves whether the "substantially likely" standard should apply to the determination as to whether Vasquez has a financial interest in the waiver of the privilege that is reasonably foreseeable, such that she should not have participated in the vote.

In *Smith v. Superior Court*, *supra*, 31 Cal.App.4th 205, a federal action was brought by several minority groups challenging the construction of a new county hospital in a predominantly White area, alleging that the construction reflected a systematic policy of discrimination against poor and minority residents. A preliminary injunction was issued in the federal case. The board of supervisors governing the county voted, three-to-two, to appeal the preliminary injunction. One of the voting members, Jeffrey Smith, was a physician who was employed, along with his physician wife, at the county's health service department. A party to the federal litigation then brought a petition in state court seeking to enjoin the board of supervisors' vote and alleging that Smith had a financial interest in the vote. The superior court set aside the vote, concluding that it was reasonably foreseeable that the federal litigation would affect whether Smith and his wife would lose their positions. Smith filed a petition for writ of mandate, which was granted. The Court of Appeal concluded that it was not reasonably foreseeable that the preliminary injunction could affect Smith or his wife's employment, and stating that "[n]o judicial decision has been cited or found which discusses the meaning of 'reasonably foreseeable' in the context of Government Code section 87103. Smith has attached to his exhibits a copy of an opinion of the Fair Political Practices Commission [citation] and copies of several advice letters in which the FPPC has explained its interpretation

of the phrase. For example, the FPPC has stated: 'An effect is considered reasonably foreseeable if there is a substantial likelihood that it will occur. Certainty is not required. However, if an effect is only a mere possibility, it is not reasonably foreseeable.'" (*Id*. at p. 212.) In granting the petition for writ of mandate, the Court of Appeal concluded that a preliminary injunction could not affect county health services, so did not present even a speculative impact on Smith and his wife, and accordingly determined that there was no material financial effect requiring recusal from the vote. (*Ibid*.)

Petitioners argue that more recent guidance, including letter advice provided by the FPPC, provides a clearer application of the "reasonably foreseeable" standard. Although FPPC advice letters are not binding legal authority, we consider them "because the FPPC's views about a statutory scheme that it enforces merit strong consideration. 'However, [the FPPC's views] are not binding on us. Ultimately, questions of statutory and regulatory construction are the responsibility of the courts. . . .'" (*People v. Thrasher* (2009) 176 Cal.App.4th 1302, 1309.) In light of *Smith*, in a subsequent such advice letter, FPPC specifically addressed whether a material financial effect must be substantially likely to occur, stating: "[a]n official has a conflict of interest in a governmental decision only if a material financial effect is reasonably foreseeable. Regulation 18706(a) states that a material financial effect is reasonably foreseeable 'if it is substantially likely that one or more of the materiality standards [. . .] applicable to that economic interest will be met as a result of the governmental decision.' While this language appears to state the obvious, it has been misinterpreted in past letters to state that 'reasonably foreseeable ***means*** substantially likely,'

even though there is no support for this interpretation in either the statute or the regulation, and it is contrary to general princip[les] relating to conflict of interest laws. [¶] Fortunately, at a recent Commission meeting, the Commission specifically rejected this prior interpretation and to the extent that any past advice letters have used this interpretation, they are rescinded. More recent advice letters have correctly stated that a financial effect need not be certain or even substantially likely to be reasonably foreseeable, but it must be more than a mere possibility." (Cal. Fair Political Prac. Com., File No. I-12-161 (Douglas Holland) Dec. 28, 2012 [2012 WL 6951872, at *4, fn. omitted].)

Vasquez argues that at least three intervening events—the privileged information must assist her, a favorable jury verdict must result, and the trial court must determine that she is eligible for an award—demonstrate that any potential financial benefit to her is too remote and therefore not reasonably foreseeable pursuant to the "extraordinary circumstances not subject to the public official's control" exception set forth in section 18701 of the California Code of Regulations. These events, although necessary for any recovery, are necessary to any resolution of any lawsuit. Given that Vasquez is the only party advancing the lawsuit, that petitioners' demurrers to her initial complaint were sustained due to the barrier presented by the attorney-client privilege to the defendants' ability to defend the case, and that Vasquez herself introduced the motion after the court suggested that the board might waive the privilege, the conflict presented here is clear, unlike the more attenuated potential conflicts present in *Smith* and similar cases. Under any reasonable reading of the "reasonably foreseeable" test, including

the regulations' "realistic possibility" test, Vasquez has a material financial interest in the outcome of the privilege waiver: had she not proposed and approved the waiver, the fact that the first amended complaint was at risk of dismissal alone provided that interest. The express prayer set forth in the first amended complaint, for a portion of any penalty awarded in accordance with the California False Claims Act (between 25 percent to 50 percent under the False Claims Act), provides a direct financial incentive such that Vasquez should not have voted on the privilege waiver motion pursuant to the requirements of the PRA.

Consideration of motion to dismiss and demurrer

Without a valid waiver of the attorney-client privilege, Buchalter and Wance contend that it would violate due process to force them to defend themselves without revealing privileged information. The superior court, applying the four-part test from *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 792–794, concluded that this case does not represent one of the "rarest" of cases that must be dismissed on the ground that "a defendant attorney's due process right to present a defense would be violated by the defendant's inability to disclose a client's confidential information if the action were allowed to proceed." (*Id*. at p. 792.) This decision, however, relied upon Central Basin's express waiver of the attorney-client privilege,[3] and the

[3] Vasquez, on the other hand, argues that petitioners are not required to disclose privileged communications at all in connection with the complaint, because the allegations are "not about communications between the District and its attorneys but rather about what was not communicated, both to the public and to the District."

asserted other bases for waiver, therefore, were not addressed by the superior court in its order or at the hearing.[4] Because we conclude this was error, we remand to the superior court to consider the demurrer and motion to dismiss the first amended complaint in light of this opinion. We express no opinion with respect to the effect of subsequent actions taken by the board, including any subsequent motions to expressly waive the attorney-client privilege, as those actions are not a part of the record before us.

DISPOSITION

THEREFORE, let a peremptory writ issue, commanding respondent superior court to vacate its order of May 19, 2016, granting judicial notice of the October 9, 2014 action by Central Basin, overruling Petitioners' demurrer and denying the motion to dismiss, and to issue a new and different order denying the request for judicial notice. The demurrer and motion to dismiss are remanded to the superior court for further proceedings consistent with this opinion, including permitting Vasquez to amend her complaint. In all other respects, the petition is denied. The temporary stay order is hereby terminated. Each party is to bear its own costs.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J. LUI, J.

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[4] The superior court previously sustained the petitioners' demurrer based on a finding of no implied waiver.